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IN THE

Supreme Court of the United States

October Term—1949

No. 691

WILLIAM M. BROWN,

Petitioner,

—v.—

KENNETH C. ROYALL, Secretary of the Army,
and
EDWARD F. WITSEL, the Adjutant General,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR RECONSIDERATION OF PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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William M. Brown,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR RECONSIDERATION OF PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Justices of the Supreme Court of the United States:

Comes now William M. Brown, the petitioner in the above entitled cause and presents this, his petition for reconsideration of the petition for a writ of certiorari to the United States Court of Appeals for the District

of Columbia Circuit and, in support thereof, respectfully shows:

I

On May 8, 1950 this Honorable Court denied petitioner's petition for a writ of certiorari, hereinafter referred to as the petition.

II

That by denying said petition, this Honorable Court has denied to petitioner and foreclosed to him any possibility of demonstrating to a civil court the truth of the allegations contained in said petition and the reasons why an appeal should be allowed.

That since the inception of the action from which this petition emanates, petitioner has been denied the right to present his case to a court and to explain and show the reasons why the order of the general court-martial (R. 18-26) should be set aside and vacated.

III

That there are substantial differences in the facts between the case of *Humphrey* v. *Smith,* 336 U. S. 695, and the case at bar, which abundantly demonstrate that this case should not be considered bound by the holding of the *Humphrey* case.

IV

That this action is not premature as asserted by respondents (ftn, App. 9), for it was instituted on the 4th day of December, 1947, which was prior to the enactment of AW 53, Act of June 24, 1948, c. 625, Title II, §230, 62 Stat., 604, 639, 10 U. S. C., 1946 ed., Supp. II, 1525.

V

That while AW 53 hereinabove referred to would at first blush appear to give a substantial right to petitioner, it is apparent that the discharge he would obtain, in the event that said discharge was granted, would not be equivalent to an honorable discharge, and the rights and privileges accruing to a discharge issued under AW 53 would be different from those of an honorable discharge to which petitioner is entitled.

VI

That as the matter presently stands, petitioner has been foreclosed from presenting his case to any court and must live under a cloud for the rest of his life, due to an initial error made at a time when he was unable to defend himself as provided for by law.

VII

That what occurred at the time petitioner was held for trial before a general court-martial was in violation of the Constitution, Articles of War, Army regulations, and all other statutes applicable thereto. That in support of petitioner's contention, the following authorities are submitted to this Honorable Court for consideration:

A. *A Manual for Courts-Martial, U. S. Army, 1928* (corrected to April 20, 1943), provides as follows:

"123. COURTS-MARTIAL—RULES OF EVIDENCE—Privileged and Nonprivileged Communications.

a. General.—A privileged communication is one that relates to matters occurring during a confidential

relation which it is the public policy to protect. A witness can decline to answer a question touching such a communication, and where the privilege is that of the accused, or of the Government, or of any person other than the witness, the court will not permit the witness to answer such question, except with the consent of the person entitled to the benefit of the privilege or of the proper governmental authorities, as the case may be.

b. Certain privileged communications.—Communications Between * * * Between Attorney and Client. * * * *The testimony of the attorney as to communications between the client and the attorney, made while the relation of attorney and client existed and in connection with the matter for which the attorney was engaged, will not be received by a court,* unless such communications clearly contemplate the commission of a crime; * * * Of course, communications prior to or subsequent to the relation are not privileged. The client, but not the attorney, may waive this privilege. * * *"(pp. 130, 131). (Emphasis supplied.)

B. *Manual for Courts-Martial, U. S. Army, 1949*:

"137. PRIVILEGED AND NONPRIVILEGED COMMUNICATIONS.—

a. General.—*A privileged communication is one that relates to matters occurring during a confidential relation which it is the public policy to protect.* A witness can decline to answer a question touching such a communication, and if the privilege is that of the accused, or of the Government, or of any person other than the wit-

ness, the court will not permit the witness to answer the question, except with the consent of the person entitled to the benefit of the privilege or of the proper governmental authorities, as the case may be.

b. Certain privileged communications— * * * Attorney and client * * *

The testimony of an *attorney* * * * *as to communications between the client and the attorney, made while the relation of attorney and client existed and in connection with the matter for which the attorney was engaged, will not be received by* a court unless such communications clearly contemplate the commission of a crime; * * *" (pp. 181, 182). (Emphasis supplied.)

C. *Military Justice Handbook.* Department of the Army Pamphlet No. 27-6:

"2. *Qualifications of Counsel* * * *

b. Effect of prior participation in same case. No person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case may subsequently act in the same case as a member of the prosecution; no person who has acted as member, trial judge, advocate, assistant trial judge advocate, or investigating officer in any case may subsequently act as defense counsel or assistant defense counsel in the same case unless he is expressly requested by the accused (AW 11). Whether counsel for either side have participated previously in any capacity in any case must be shown affirmatively in the record of trial (MCM, App. 5) (p. 2).

Petitioner submits that his case is similar in many respects to that of *Wong Yang Sang* v. *McGrath,* No. 154, October 1949 Term decided by this Honorable Court on February 20, 1950 and reported at 339 U. S. 33. It will be recalled that in the cited case the error which led to reversal was the use of an inspector who acted as presiding officer and prosecuting officer, thereby depriving Sang of a fair and impartial hearing. Likewise in your petitioner's case there was a deprivation of due process and a violation of his constitutional rights by the Army's use of petitioner's counsel as Investigating Officer.

It is Petitioner's contention that as was so well stated in the *Sang* case, *supra,* at page 50, "• • • When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." These standards of impartiality were not accorded this petitioner and therefore it is respectfully submitted that your petitioner was deprived of his constitutional rights and denied due process.

Your petitioner further submits that in his case the Investigating Officer could not properly perform his office in the same manner as an impartial man since the investigating officer had been retained originally as defense counsel. The result of such a situation was to create in the impartial investigating machinery conflicting spheres of interest which would prevent, in any event, the fair and impartial investigation required by the Articles of War, Army Regulations and all statutes applicable thereto.

VIII

Your petitioner is now so situated that he cannot, under any circumstances, by virtue of the ruling of this Honorable Court, attack the court-martial findings and thus vindicate himself.

WHEREFORE, upon the foregoing grounds, it is respectfully requested that this petition for reconsideration of the petition for certiorari to the Court of Appeals for the District of Columbia Circuit be granted, and that on reconsideration this Honorable Court grant the petition for certiorari to the Court of Appeals for the District of Columbia Circuit, and for such other and further relief as may be just and proper in the premises.

Dated: May 22, 1950.

Respectfully submitted,

.....

Morton Singer

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Counsel for Petitioner.

Certificate

I, MORTON SINGER, one of the counsel for the above named petitioner, William M. Brown, do hereby certify that the foregoing petition for reconsideration of the petition for certiorari to the Court of Appeals for the District of Columbia Circuit is presented in good faith and not for the purposes of delay; that the petition is restricted to the grounds above presented and to other substantial grounds available to petitioner although not previously presented.

.....

MORTON SINGER,
one of Counsel for petitioner.